(19)

No. 02-626

Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONER

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

32pp

QUESTION PRESENTED

Whether the transfer of water containing preexisting pollutants is an addition of pollutants from a point source subject to the NPDES permit program of the Clean Water Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
THE MERE TRANSFER OF WATER CONTAINING PRE-EXISTING POLLUTANTS IS NOT AN ADDITION OF POLLUTANTS FROM A POINT SOURCE UNDER THE CWA	6
A. The CWA Recognizes That Pollution Can Be Caused By Both Point And Nonpoint Sources And Provides For The Control Of Pollution Based On Its Source	7
B. Water Diversion Operations That Do Not Add A Pollutant To The The Water Being Pumped Are Not Subject To The NPDES Program	11
C. Reversal Of The Judgment Below Will Not Leave The Navigable Waters Unprotected From Pollution	23
CONCLUSION	26

TABLE OF AUTHORITIES

Cases	Page
Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976)	14, 19
Ardestani v. INS, 502 U.S. 129 (1991)	12
BankAmerica Corp. v. United States, 462 U.S. 122 (1983)	20
Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York, 244 F.Supp.2d 41 (N.D.N.Y 2003)	6, 22
City of Trenton v. New Jersey, 262 U.S. 182 (1923)	1
E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977)	20
FTC v. Bunte Brothers, Inc., 312 U.S. 349 (1941)	20
National Wildlife Fed. v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982)	*passim*
National Wildlife Fed. v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988)	*passim*
United States v. James, 478 U.S. 597 (1986)	12

Statutes & Regulations	
40 C.F.R. Pts. 401-471	8
Pt. 405	20
Pt. 415	20
33 U.S.C. § 1251(a)	7
§ 1251(a)(1)	7
§ 1251(a)(7)	7
§ 1251(g)	22
33 U.S.C. § 1311	7
§ 1311(a)	2, 7, 12, 14
§ 1311(b)	2, 5, 20
§ 1311(b)(2)(E)	2, 8
§ 1311(e)	7

TABLE OF AUTHORITIES—Continued

	Page
33 U.S.C. § 1313(d)(1)(A)	23
§ 1313(d)(1)(C)	23
33 U.S.C. § 1314(a)(2)	23
§ 1314(f)	9, 18
§ 1314(f)(1)	15
§ 1314(f)(2)(F)	2, 4, 9, 15
33 U.S.C. § 1316	5, 20
§ 1316(a)(1)	8
§ 1316(b)(1)(A)	8
§ 1316(b)(1)(B)	8
33 U.S.C. § 1319(a)(1)	22
§ 1319(c)	6
§ 1319(c)(1)	22
§ 1319(c)(2)	22
§ 1319(d)	6, 22
33 U.S.C. § 1329(a)(1)(A)	2, 9, 23
§ 1329(a)(1)(B)	2, 9-10, 23
§ 1329(b)(1)	10, 23
§ 1329(b)(2)	23
§ 1329(b)(2)(A)	3, 10
§ 1329(b)(2)(B)	3, 10, 23
§ 1329(b)(2)(C)	10
§ 1329(b)(4)	10
33 U.S.C. § 1342	7, 14
§ 1342(a)	2
33 U.S.C. § 1362(6)	12, 16
§ 1362(12)	*passim*
§ 1362(14)	11, 16
§ 1362(19)	14

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
Environmental Law Institute, *Enforceable State Mechanisms For The Control of Nonpoint Source Water Pollution* (1997)	15
Letter from Alan G. Kirk, Acting Asst. Administrator for Enforcement & Gen. Counsel, U.S. EPA, to S. Leary Jones, Director, Division of Water Quality Control, Tennessee Dept. of Pub. Health (June 23, 1973)	18
South Florida Water Management District, *2003 Everglades Consolidated Report Executive Summary*	24, 25
South Florida Water Management District, *Facility and Infrastructure Location Index Map* (Version 5: 2002)	16
U.S. EPA, *The Control of Pollution From Hydrographic Modifications* (1973)	18, 18-19, 19
Office of Water, U.S. EPA, *The Quality of Our Nation's Water* (1992)	15
Office of Water, U.S. EPA, *U.S. EPA NPDES Permit Writer's Manual* (1996)	21
Webster's Third New International Dictionary of the English Language Unabridged (1986)	3, 12, 13
Office of Wetlands, Oceans, & Watersheds, U.S. EPA, *Nonpoint Source News-Notes* (May 2003)	24

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments and are committed to fulfilling their obligations under federal and state law to protect water quality.

A "state undoubtedly has power, and it is its duty, to control and conserve the use of its water resources." *City of Trenton v. New Jersey*, 262 U.S. 182, 185 (1923). The control and diversion of water is a critical state function which serves the vital purposes of preventing flooding, providing a water supply, facilitating commerce, and improving recreational activities. The States have created numerous special government districts such as petitioner to carry out this function.

The court of appeals held that water diversion operations that merely transfer water containing pre-existing pollutants from one body of water to another are point source discharges subject to the Clean Water Act's NPDES permit program. The court's holding cannot be squared with the ordinary meaning of the CWA's text and disregards the policy reflected in the Act's structure. Moreover, it imposes a costly and impractical system of regulation on water management authorities.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

---

[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

SUMMARY OF ARGUMENT

1. The Clean Water Act (CWA) establishes two distinct approaches for controlling water pollution, one for point source discharges of pollutants and the other for nonpoint source discharges. Point source discharges, which are defined as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), are subject to the National Pollution Discharge Elimination System (NPDES) permit program. *See id.* §§ 1311(a); 1342(a). Under NPDES, point source discharges are subject to effluent limitations established by the EPA. *See id.* § 1311(b). Point sources must also ordinarily install "the best conventional pollutant control technology as determined" by the EPA. *Id.* § 1311(b)(2)(E).

Congress has chosen fundamentally different strategies for dealing with nonpoint source pollution. "State water quality standards are the basis of the 'nonpoint source' program." *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988). In CWA section 304, Congress directed EPA to identify and evaluate nonpoint sources of pollution including "processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters." 33 U.S.C. § 1314(f)(2)(F). Congress thus manifested its understanding that water management operations such as those at issue in this case involve nonpoint source rather than point source discharges.

Congress has also directed each State to identify and report to EPA "those navigable waters . . . which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain . . . applicable water quality standards." *Id.* § 1329(a)(1)(A). The State must also identify significant nonpoint sources of pollutants. *See id.* § 1329(a)(1)(B). Finally, each State must identify Best Management Practices (BMPs) that will reduce nonpoint source

discharges, *see id.* § 1329(b)(2)(A), as well as other programs such as enforcement, education, and technical assistance "to achieve implementation of the [BMPs]." *Id.* § 1329(b)(2)(B).

2. Disregarding both the statutory definition of the term "discharge of a pollutant" and the structure of the CWA, the court of appeals held that the Water District's use of the S-9 to transfer water which contains pre-existing pollutants from the C-11 Basin to WCA-3A is subject to the NPDES scheme. The court of appeals acknowledged that the S-9 "adds no pollutants to the water which it conveys." Pet. App. 3a. It nonetheless held that the S-9 is a point source discharger, reasoning that "[f]or pollutants to be *from* a point source, the point source does not necessarily have to be the source or origin of pollutants." *Id.* at 7a n.6. According to the court, "[f]rom a point source can also indicate the agent or instrumentality or the cause or reason by which the pollutants are added to navigable waters." *Id.* (internal quotations and citations omitted). This construction distorts the ordinary meaning of the statutory language, which defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

As commonly understood, the term "addition" means "the act or process of adding: the joining or uniting of one thing to another." *Webster's Third New International Dictionary of the English Language Unabridged* 24 (1986). In this case, the pollutants are "join[ed]" or "unit[ed]" with "the navigable waters of the United States"—the term Congress chose to define the CWA's jurisdiction—when they first enter those waters as the result of nonpoint source discharges. The subsequent pumping of navigable waters which contain pre-existing pollutants to another portion of the navigable waters does not result in a "joining" of a pollutant with navigable waters.

Congress's use of the phrase "from a point source" reinforces this conclusion. "From" is most commonly "used as a function word to indicate a starting point" such as "a point or place where an actual physical movement . . . has its beginning." *Id.* at 913. The S-9 is not the "point or place where [the] actual physical" addition of a pollutant to the navigable waters "has its beginning." The court of appeals' construction thus denies the statutory language its ordinary meaning.

3. Rather than focus on the fundamental inquiry of whether the Water District was introducing pollutants into the navigable waters from the outside world, the court of appeals further held that "[w]hen a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water . . . that point source is the cause-in-fact of the discharge of pollutants." Pet. App. 7a-8a. The court's holding ignores that Congress expressly recognized that flow diversion activities do not involve point source discharges. *See* 33 U.S.C. § 1314(f)(2)(F).

The court's test is also flawed because it requires unfounded judicial inquiries into whether water bodies should be considered separate or the same and what the natural flow of water would be. Here, for example, the court acknowledged that water seeps through the levees from WCA-3A into the C-11 Canal. The court nonetheless declared WCA-3A and the C-11, which are part of an integrated flood control system, to be "two separate and distinct bodies of water." Pet. App. 8a n.8. This inquiry, however, has no basis in the statutory language which addresses the physical introduction of a pollutant from the outside world to the navigable waters as a whole.

4. The court of appeals' holding is also contrary to EPA's longstanding view that water management activities that merely alter the movement, flow or circulation of waters are

not subject to the NPDES program unless the activity physically introduces a pollutant into the navigable waters from the outside world. As recently as 1988, EPA took the position "that there can be no addition [of a pollutant] unless a source physically introduces a pollutant into water from the outside world." *Consumers Power*, 862 F.2d at 584 (other citation and internal quotations omitted). Moreover, for more than thirty years, EPA has had authority to promulgate national effluent standards for both existing and new categories and classes of point sources. *See* 33 U.S.C. § 1311(b); *id.* § 1316. While EPA has promulgated standards applicable to more than fifty different categories (and numerous subcategories) of point source dischargers, it has never promulgated effluent standards applicable to water diversion facilities.

5. Applying the NPDES program with its effluent limitations to water diversion operations would be impractical, if not wholly unworkable. One of the fundamental premises of the NPDES program is that an industrial facility's manufacturing processes will produce predictable types and levels of pollutants which can be treated in a cost-effective manner. Water diversion facilities, however, deal with a far more varied set of operating circumstances than do industrial facilities. Moreover, because water bodies collect pollutants added by nonpoint sources such as unchanneled urban runoff and agricultural runoff, water management agencies are confronted with a far greater number of potential pollutants than are industrial facilities. Indeed, the presence and concentration of particular pollutants are unpredictable as human conduct and weather conditions can be the cause of polluted runoff into a waterbody.

Because the types of pollutants found in such waters are numerous and highly variable, they are not susceptible to cost-effective regulation through effluent limitations. Moreover, water management agencies may lack legal authority to hold nonpoint source dischargers accountable for the pollu-

tion they cause. Most disturbingly, the holding below subjects the Water District and its employees to substantial civil and criminal penalties for engaging in essential diversion operations. *See* 33 U.S.C. § 1319(c) & (d); *see also Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 55 (N.D.N.Y. 2003) (assessing over $5.7 million in CWA penalties on municipal defendant). The judgment of the court of appeals should therefore be reversed.

ARGUMENT

THE MERE TRANSFER OF WATER CONTAINING PRE-EXISTING POLLUTANTS IS NOT AN ADDITION OF POLLUTANTS FROM A POINT SOURCE UNDER THE CWA

The text and structure of the Clean Water Act (CWA) manifest Congress's intent that water management operations that merely divert the flow of water without physically introducing any pollutant to it are not point source discharges subject to the National Pollutant Discharge Elimination System (NPDES) program. Indeed, for more than thirty years EPA has declined to regulate water management operations under the NPDES program. Moreover, there are substantial regulatory initiatives that address nonpoint source pollution both under the CWA and state environmental laws. In the case of the S-9 and the Everglades, the State of Florida and the South Florida Water Management District ("Water District") have undertaken extensive measures to abate pollution in the Everglades and have substantially reduced its phosphorus levels. The judgment of the court of appeals should therefore be reversed.

A. The CWA Recognizes That Pollution Can Be Caused By Both Point And Nonpoint Sources And Provides For The Control Of Pollution Based On Its Source

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress set "the national goal that the discharge of pollutants into the navigable waters be eliminated." *Id.* § 1251(a)(1). It further established "the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." *Id.* § 1251(a)(7). Consistent with these policies, the CWA establishes two distinct approaches for controlling water pollution, which depend upon whether a pollutant is discharged by a "point source" or a "nonpoint source." *See National Wildlife Fed. v. Gorsuch*, 693 F.2d 156, 165-66 (D.C. Cir. 1982).

1. *Point Source Pollution.* Point source discharges of pollutants are regulated by the National Pollutant Discharge Elimination System (NPDES) permit program. *See* 33 U.S.C. § 1342. "[T]he discharge of any pollutant by any person" from a point source is unlawful except when the discharge complies with other provisions of the CWA. *Id.* § 1311(a). The EPA or an authorized state agency may, however, "after . . . . public hearing, issue a permit for the discharge of any pollutant [from a point source] . . . upon condition that such discharge will meet" applicable requirements including the effluent limitations mandated by section 301, 42 U.S.C. § 1311. *Id.* § 1342. *See also id.* § 1311(e) ("Effluent limitations established pursuant to this section . . . shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter."). These effluent

limitations ordinarily "require [the] application of the best conventional pollutant control technology as determined" by the EPA. *Id.* § 1311(b)(2)(E).

The CWA directs EPA to "publish" within ninety days of the Act's enactment "and from time to time thereafter . . . revise . . . a list of categories" of point sources. *Id.* § 1316(b)(1)(A). The Act further grants EPA authority to promulgate "regulations establishing Federal standards of performance for new sources within [each] category" of point source. *Id.* § 1316(b)(1)(B).[2] The statute lists twenty-seven categories of point sources that EPA is required to regulate, but does not include water diversion facilities. *See id.* § 1316(b)(1)(A). Moreover, over the last thirty years EPA has promulgated extensive regulations applicable to more than fifty different categories of point sources. *See* 40 C.F.R. Pts. 401-471. Water management/diversion facilities, however, are not included in the EPA's point source regulations.

2. *Nonpoint Source Pollution.* Under the CWA, nonpoint source pollution "is defined by exclusion and includes all water quality problems not subject to" point source regulation. *Gorsuch*, 693 F.2d at 166. As the EPA explained in its *Gorsuch* brief, "nonpoint sources include, *inter alia*, unchanneled runoff from agricultural [and] silvicultural . . . activities." EPA Br. 8, *Gorsuch*, 693 F.2d 156 (internal quotations and citations omitted).

---

[2] Section 306 defines "standard of performance" as:

> a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

33 U.S.C. § 1316(a)(1).

In contrast to the NPDES program, which reduces pollution by imposing effluent limitations on point sources, Congress has chosen fundamentally different strategies for dealing with nonpoint source pollution. "State water quality standards are the basis of the 'nonpoint source' program." *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988); *see also* EPA Br., *Gorsuch*, 7. Thus, in section 304—which bears the heading "Identification and evaluation of nonpoint sources of pollution"—Congress ordered the EPA to " issue to . . . the States, water pollution control agencies and agencies designated under section 1288 . . . guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants." 33 U.S.C. § 1314(f).

Most significantly, in this section, Congress expressly directed EPA to provide information to these agencies regarding the "processes, procedures, and methods to control pollution resulting from . . . *changes in the movement, flow, or circulation of any navigable waters or ground waters*, including changes caused by the construction of dams, levees, channels, causeways, or *flow control diversion facilities*." *Id.* § 1314(f)(2)(F) (emphasis added). Congress thus manifested its understanding that water management operations such as those at issue in this case involve nonpoint source rather than point source discharges.

Congress subsequently amended the CWA to require each State to "prepare and submit" for EPA approval "a report which . . . identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards. " *Id.* § 1329(a)(1)(A). The report must also "identif[y] those categories and subcategories of nonpoint sources or, where appropriate, partic-

ular nonpoint sources which add significant pollution to each portion of the navigable waters identified." *Id.* § 1329(a)(1)(B).

Most significantly, Congress directed that each State "prepare and submit" for EPA approval a "management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters." *Id.* § 1329(b)(1). Among other things, Congress mandated that each State's program contain "[a]n identification of the best management practices [BMPs] and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated" in the State's report. *Id.* § 1329(b)(2)(A). Moreover, the State must identify programs such as "enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects . . . to achieve implementation of the [BMPs]," *id.* § 1329(b)(2)(B), and include "a schedule [of] annual milestones" to measure the State's success in implementing both the programs and the BMPs. *Id.* § 1329(b)(2)(C). Each State is further directed to "develop and implement" its nonpoint source management program "on a watershed-by-watershed basis." *Id.* § 1329(b)(4).

As the forgoing demonstrates, Congress sanctioned a far different approach for controlling nonpoint source pollution than the NPDES program with its effluent-based discharge limitations. As explained below, petitioner's operation of the S-9 does not constitute a point source discharge of pollutants under either the plain meaning of the relevant statutory provisions or EPA's longstanding construction of them.

B. Water Diversion Operations That Do Not Add A Pollutant To The Water Being Pumped Are Not Subject To The NPDES Program

It is undisputed that the C-11 Canal "collects water run-off from the [western Broward County] basin and seepage through the levees from WCA-3A." Pet. App. 3a. This runoff "contains higher levels of phosphorus than that naturally occurring in WCA-3A." *Id.* While the S-9 falls within the definition of a "point source," *see* 33 U.S.C. § 1362(14), it is also undisputed that the S-9 "adds no pollutants to the water which it conveys." Pet. App. 3a.

The court of appeals nonetheless held that use of the S-9 for water diversion operations rendered it a point source discharger of pollutants subject to the NPDES program. *See id.* at 6a-9a. The court reasoned that:

> When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs.

Id. at 7a-8a.

The court further explained that "[f]or pollutants to be *from* a point source, the point source does not necessarily have to be the source or origin of pollutants." *Id.* at 7a n.6. According to the court, the statutory language "'[f]rom a point source' can also indicate the 'agent or instrumentality' or the 'cause or reason' by which the pollutants are added to navigable waters. We conclude that this interpretation of 'from' is most apt: from=by." *Id.* (quoting *The Random House Dictionary of the English Language* 770 (2d ed. 1987)).

The court's construction of the operative statutory language distorts the ordinary meaning of its terms, which focus on the introduction of the pollutant into the navigable waters from the outside world. It ignores Congress's carefully crafted scheme for regulating water pollution based on its source as well as thirty years of administrative practice under the CWA. Most troubling, it subjects water management agencies to liability including substantial fines and penalties, the cost of installing expensive control technology for pollution they did not cause, and the burden of obtaining an NPDES permit even though in many cases the large variety of pollutants that enters their waters renders the installation of effluent control technology impractical. It would thus lead to numerous absurd results.

1. As in every case of statutory construction, "'[t]he starting point . . . is the language of the statute itself.'" *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (quoting *United States v. James*, 478 U.S. 597, 604 (1986)) (other citation and internal quotations omitted). When individual words may have multiple definitions, the Court's task is to look at the operative language in "context" and give the statute its "most natural reading." *Id.* at 135.

As explained above, section 301(a) renders "the discharge of any pollutant by any person . . . unlawful" except when conducted in compliance with other enumerated provisions of the CWA. 42 U.S.C. § 1311(a). As relevant here, the CWA defines the term "discharge of a pollutant" to "mean[] . . . any *addition* of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (emphasis added). It also defines the term "pollutant" to mean a variety of substances "discharged into water." *Id.* § 1362(6).

As commonly understood, the term "addition" means "the act or process of adding: the joining or uniting of one thing to another." *Webster's Third New International Dictionary of the English Language Unabridged* 24 (1986). In this case,

the pollutants are "join[ed]" or "unit[ed]" with "the navigable waters" of the United States—the term Congress chose to define the jurisdiction of the act—when they first enter those waters as the result of nonpoint source discharges. *See* Pet. App. 3a; *see also* 33 U.S.C. § 1362(12). The subsequent pumping of navigable waters which contain pre-existing pollutants to another portion of the navigable waters does not result in a "joining" of a pollutant with navigable waters. The pollutant has already been added to the navigable waters from the outside world.[3]

Contrary to the view of the court of appeals, Congress's use of the phrase "from a point source" reinforces this conclusion. While the word "from" has several meanings, it is most commonly "used as a function word to indicate a starting point" such as "a point or place where an actual physical movement . . . has its beginning" or as "the starting or focal point of any activity or movement." *Webster's Third New International Dictionary*, at 913. It is also commonly "used as a function word to indicate the source or original or moving force of something" such as "the source, cause, means, or ultimate agent of an action or condition" or "the place of origin, source, or derivation of a material . . . thing." *Id.*

Here, the point source (S-9) is not the "point or place where [the] actual physical" addition of pollutant to the navigable waters "has its beginning." The S-9 is not "the place of origin," the "cause" or the "source" of the addition of pollutants to the navigable waters. Rather, it is simply a conduit within the navigable waters. The court of appeals'

---

[3] In defining the reach of the discharge prohibition, Congress did not use the phrase "to a body of the navigable waters" but rather the general phrase "to navigable waters." 33 U.S.C. § 1362(12). The use of this terminology reinforces the conclusion that the statute is directed at the physical introduction of a pollutant into the navigable waters from the outside world rather than transfers of water within the navigable waters.

simplistic redefinition of the term ("from=by") and its conclusion that "[f]or pollutants to be *from* a point source, the point source does not necessarily have to be the source or origin of pollutants," Pet. App. 7a n.6, denies the statutory language its ordinary meaning. As the D.C. Circuit has explained:

> [I]t does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, "all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to "addition" of "pollutants" "from" a point source.

Gorsuch, 693 F.2d at 176. *See also Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) ("[T]he Act prohibits only the addition of any pollutant to navigable waters from a point source. Those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass.").

Other provisions of the statute support the common-sense reading that the CWA's prohibitions on point source discharges are directed at the initial introduction of a pollutant into the navigable waters from the outside world. Congress defined "pollutant" as meaning various substances "discharged into water." 33 U.S.C. § 1362(6). Congress defined "pollution" as meaning "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* § 1362(19). Once a pollutant is discharged into the navigable waters, it joins with the water to become pollution. The relevant language of the CWA does not, however, prohibit the discharge of "pollution," but rather, the discharge of a "pollutant." *Id.* § 1311(a).

2. Rather than focus on the fundamental inquiry of whether the Water District was introducing pollutants into the navigable waters from the outside world, the court of appeals

created an inherently flawed test. The court adopted a broad rule of "but for" causation that, if affirmed, will erroneously subject a wide range of water management activities to the NPDES program. *See* Pet. App. 7a ("an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters").

The court then reasoned that "[w]hen a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants." *Id.* at 7a-8a. Beyond the fact that the court's application of its test demonstrates that it is inherently manipulable, Congress itself expressly recognized that flow diversion activities do not involve point source discharges. *See* 33 U.S.C. § 1314(f)(1) & (2)(F) (directing EPA to issue guidelines concerning nonpoint sources of pollutants and to provide information on "processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities").

"After 25 years of federal and state efforts under the federal Clean Water Act, nonpoint source pollution remains a significant problem." Environmental Law Institute, *Enforceable State Mechanisms For The Control of Nonpoint Source Water Pollution* 1 (1997). Indeed, "nonpoint sources of pollution are more widespread [than point sources] and introduce vast quantities of pollutants into our surface and ground waters." Office of Water, U.S. EPA, *The Quality of Our Nation's Water* 9 (1992). Most water bodies in the country likely collect some nonpoint source pollutants in the form of runoff or atmospheric deposition; they may also contain some pollutants from natural sources. *See id.*

Moreover, any body of water that is used either for maritime commerce or recreational boating is likely to contain pollutants such as spilled fuel and cargo, as well as trash that has been thrown overboard. *See* 33 U.S.C. § 1362(6) (defining "pollutant" as including "garbage").

Under the court of appeals' test, canal systems that connect one body of water to another for a variety of purposes including facilitating commerce would be deemed point source dischargers. Routine canal operations of pumping water into and draining water from a lock would thus require an NPDES permit whenever canal waters flow into another body of water or vice versa.[4] Under the court's reasoning, such operations would result in an addition of pollutants to a receiving body of the navigable waters and the lock operations would be "the cause-in-fact of the release of pollutants into navigable waters." Pet. App. 7a.

Indeed, under the court of appeals' rationale, even if the Water District did not pump water from the C-11 Canal, the Canal itself might require an NPDES permit. The C-11 Canal drains in an easterly direction into other bodies of water such as the South New River Canal and the Dania Cut-Off Canal, the Intracoastal Waterway, and the Atlantic Ocean. *See* South Florida Water Management District, *Facility and Infrastructure Location Index Map* (Version 5: 2002). According to the court of appeals, before the construction of the C-11 Canal, "the natural flow of the waters [in the C-11 basin] . . . was a southerly moving sheet of water." Pet. App. 8a n.8. The Canal, in the court of appeals' formulation, thus

[4] The term "point source" is broadly defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, [or] *channel* . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). A canal is thus a point source. Given the wide range of substances that are pollutants under the CWA, every waterbody is likely to contain some pollutant even if the water body is not deemed to be impaired.

"changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed." *Id.* at 7a. The Canal is therefore. under the court's logic, "the cause-in-fact of the discharge of pollutants." *Id.*

The court of appeals' test is manifestly flawed in that it requires artificial judicial inquiries into whether water bodies should be considered separate or the same and what the natural flow of water would be. Here, for example, the court below first acknowledged but then disregarded the historic intermingling of the waters from the C-11 Basin and the WCA-3a. *Compare id.* at 3a *with id.* at 8a n.8. According to the court, "[s]ince the completion of the L-33 and L-37 levees, water does not flow from the C-11 Canal into WCA-3A. Man has made the two bodies of water two separate and distinct bodies of water." *Id.* The court's reasoning begs the question of whether the Canal and the WCA-3A would be considered the same or different bodies of water if the levee separating them was breached either by human intervention or a hurricane.

The court of appeals' acknowledgment that there is "seepage through the levees from WCA-3A" into the C-11, *id.* at 3a, underscores the internal inconsistencies of its reasoning. Notwithstanding that the S-9 simply pumps back some of the water from whence it came, and that the C-11 Canal and WCA-3A were created, with Congressional authorization, to be part of an integrated flood control system, *see* Pet. 9, the court declared them to be "two separate and distinct bodies of water." Pet. App. 8a n.8. This inquiry simply has no basis in the statutory language, which regulates the "addition of any pollutant to navigable waters" as a whole and not diversion activities within the navigable waters. 33 U.S.C. § 1362(12).

3. The court of appeals' holding is also contrary to EPA's longstanding view that water management activities that

merely alter the movement, flow or circulation of waters are not subject to the NPDES program unless the activities physically introduce a pollutant into the navigable waters from the outside world. *See generally* EPA Br., *Gorsuch*, 16-40; *Gorsuch*, 693 F.2d at 174-75. Again in 1987, EPA took the position "that there can be no addition [of a pollutant from a point source] unless a source physically introduces a pollutant into water from the outside world." *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) (citations and internal quotations omitted).

Beginning in 1973, Alan G. Kirk, then EPA's Acting Assistant Administrator for Enforcement and General Counsel concluded that discharges from dams were not subject to the NPDES program notwithstanding that dams may cause substantial water quality problems such as the "depletion of dissolved oxygen, reduction of streamflow and consequent increases in pollutant concentrations below the dam." Letter from Alan G. Kirk to S. Leary Jones, Director, Division of Water Quality Control, Tennessee Dept. of Pub. Health at 1 (June 23, 1973) (quoted in EPA Br., *Gorsuch*, 35). EPA did so on the ground that these "water quality effects [do] not result[] from the discharge of pollutants attributable to the dam itself." *Id.* Instead, pollution caused by such discharges is controlled by nonpoint source programs.[5]

---

[5] Pursuant to Congress's mandate to study the causes and control of nonpoint source pollution, *see* 33 U.S.C. § 1314(f), in 1973 EPA issued the first of several reports on the water pollution effects caused by hydrographic modifications. *See generally* U.S. EPA, *The Control Of Pollution From Hydrographic Modifications* (1973). The report specifically observed that "[t]he increased uses of land adjacent to streams following the provision of flood protection and drained arable land provide sources of pollution which directly drain into the water course. Many of the pollutants arise as the normal product of urbanization or farming practices." *Id.* at 25. The report further noted that "[f]ollowing channelization and drainage projects . . . natural places of detention [of pollutants such as phosphorus] are by-passed or removed which has the effect

EPA took this position in the *Gorsuch* litigation. In that case, EPA expressly recognized that it "is now settled that EPA cannot require the reduction or treatment of pollutants 'other than those *added*' by the discharger at the point source." EPA Br., *Gorsuch*, 23 (quoting *Appalachian Power Co. v. Train*, 545 F.2d at 1377). EPA further noted that "[g]iven EPA's lack of authority under the NPDES program to control pollutants occurring naturally in the waterway *or previously added by other sources*, EPA cannot legally control . . . dam-induced water quality changes" created by the alteration of water flows. *Id.* at 23-24 (emphasis added). *See also Gorsuch*, 693 F.2d at 169 & n.40 (noting that in 1974 and 1978, EPA "considered at length whether to require NPDES permits for dams and adhered to its original position both times"). *See also NWF v. Consumers Power Co.*, 862 F.2d at 583 ("To discharge a pollutant under the CWA, EPA argues as it had in *Gorsuch* . . . that a facility must 'add' pollutants to navigable waters of the United States.") (quoting *Gorsuch*, 693 F.2d at 174-75); *see also id.* at 584 (noting EPA's argument "that there can be no addition unless a source 'physically introduces a pollutant into water from the outside world'") (quoting *Gorsuch*, 693 F.2d at 175). In both these cases, the courts upheld the EPA's position. Most significantly, Congress did not overturn the decisions.

---

of increasing pollutant concentrations in the flowing waters. The effects of these pollutants are then transferred downstream decreasing water quality while in passage." *Id.* at 26.

As this indicates, both Congress and EPA have been long aware of the effects of nonpoint source pollution (including concentrations of chemical wastes) on waters under the control of water management agencies. *See id.* at 79 ("If lower quality water is discharged than previously existed before the reservoir then the effect is the same as that caused by a pollution source."). Yet neither Congress nor EPA has ever required water management authorities to obtain NPDES permits simply to move water from one waterbody to another.

Moreover, for more than thirty years EPA has had authority to promulgate by regulation national effluent standards for both existing and new categories and classes of point sources.. *See* 33 U.S.C. §§ 1311(b), 1316; *see also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 127-36 (1977). EPA has promulgated standards applicable to more than fifty different categories (and numerous subcategories within these categories) of point source dischargers.[6] EPA, however, has never promulgated effluent standards applicable to water diversion facilities. This is consistent with EPA's longstanding view that water diversion activities that do not physically introduce a pollutant into the navigable waters are subject to regulation under nonpoint source programs. *See* discussion *supra* at 17-19. *See also BankAmerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("'[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'") (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)).

4. Applying the NPDES program with its effluent limitations to water diversion operations would be impractical and inequitable to water management agencies. One of the fundamental premises of the NPDES program is that an industrial facility's manufacturing processes will produce predictable types and levels of pollutants which can be treated in a cost-effective manner. *See Gorsuch*, 693 F.2d at 178 & n.65 ("The Act contains numerous requirements that cost be taken into account in establishing effluent limits . . . ."). Applicants for an NPDES permit are thus required to submit

[6] For example, there are 12 subcategories of effluent standards applicable to processors of dairy products, *see* 40 C.F.R. Pt. 405, and 47 subcategories of current standards applicable to manufacturers of inorganic chemicals. *See id.* Pt. 415.

to the permitting authority information such as "[i]ntake and effluent characteristics," "[p]ollutants expected to be present," "[t]reatment technologies," and "[p]roduction information." Office of Water, U.S. EPA, *U.S. EPA NPDES Permit Writer's Manual* 33 (1996).

EPA's regulations contain Effluent Limitation Guidelines, most of which "are expressed in terms of allowable pollutant discharge per unit of production . . . or are based on wastewater flow" and which must be converted into specific permit limits. *Id.* at 63. "To determine permit limits . . . these standards are multiplied by a reasonable measure of the facility's actual production/flow rate." *Id.* While recognizing that a facility's production and wastewater flow rates "will vary," *id.*, permit writers are instructed that "[t]he objective in determining a production or flow estimate for a facility is to develop a single estimate of the long-term average production rate . . . which can reasonably be expected to prevail during the next term of the permit." *Id.* at 64. Permit writers are also required to "consider *all* applicable standards and requirements for *all* pollutants discharged" when developing effluent limitations for industrial point sources. *Id.* at 50.

Applying this system of regulation to water diversion facilities would be impractical, if not wholly unworkable. The water diverted by such facilities will frequently contain large amounts of pollutants added by nonpoint sources such as runoff and atmospheric deposition. The presence and concentration of particular pollutants are unpredictable as human conduct (such as oil/chemical spills) and weather conditions (such as rainfall levels and storms) can be the cause of pollutants entering into a waterbody. Moreover, the types of pollutants found in such waters are numerous and highly variable and are thus not susceptible to cost-effective regulation through effluent limitations.

Water diversion facilities thus deal with a far more varied set of operating circumstances and a far greater number of

potential pollutants than do industrial facilities. Moreover, water management agencies may lack legal authority to hold nonpoint source dischargers accountable for the pollution they cause. Besides imposing on water districts the expense of installing costly effluent control technology for pollutants they did not introduce into the navigable waters, the holding below subjects the districts to a permit system which cannot possibly account for all the different pollutants that may be found in their waters.

The latter is particularly disturbing because the violation of "any permit condition or limitation" is a violation of federal law, 33 U.S.C. § 1319(a)(1), which subjects the Water District and its employees to substantial civil and criminal penalties solely for engaging in essential diversion operations. *See id.* § 1319(c)(1) (criminal "fine of not less than $2,500 nor more than $25,000 per day of violation" for negligent violations); *id.* § 1319(c)(2) (criminal "fine of not less than $5,000 nor more than $50,000 per day of violation" for knowing violations); *id.* § 1319(d) ("civil penalty not to exceed $25,000 per day for each violation"). *See also Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp.2d 41, 55 (N.D.N.Y. 2003) (assessing over $5.7 million in penalties on municipal defendant for CWA violations).

The court of appeals' reading of the statute ignores that "the [CWA] shows not only Congress' determined effort to clean up our polluted lakes and rivers, but also its practical recognition of the economic, technological, and political limits on total elimination of all pollution from all sources." *Gorsuch*, 693 F.2d at 178. And it also excises from the statute Congress's "specific indication . . . that [it] did not want to interfere any more than necessary with state water management." *Id.* (citing 33 U.S.C. § 1251(g)) ("the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this [Act]").

C. Reversal Of The Judgment Below Will Not Leave The Navigable Waters Unprotected From Pollution

A ruling by this Court that the Water District's use of S-9 for flood control operations does not require an NPDES permit will not leave the navigable waters unprotected from polluters. Of course, the NPDES program applies to any point source that discharges pollutants to the navigable waters including any point source that discharges into the C-11 Basin. Moreover, for those waters where the effluent limitations established under the NPDES program "are not stringent enough to implement [a State's] water quality standard applicable to those waters," a State is required to establish "the total maximum daily load" of those pollutants determined by the EPA to be necessary to achieve water quality standards. 33 U.S.C. § 1313(d)(1)(A) & (C); *see also id.* § 1314(a)(2).

Furthermore, as explained above, *see* discussion *supra* at 9-10, the CWA requires States to identify waterways which do not meet water quality standards because of nonpoint source pollution. *See* 33 U.S.C. § 1329(a)(1)(A). States are also required to identify "categories and subcategories of nonpoint sources" and "where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified." *Id.* § 1329(a)(1)(B). Most importantly, States are required to develop comprehensive programs for controlling nonpoint source pollution, which must identify best management practices [BMPs] for controlling nonpoint source pollution and which must include a "schedule [of] annual milestones" to measure the success of implementation efforts. *Id.* § 1329(b)(1) & (2). A State's program must also identify programs such as "enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects . . . to achieve implementation of the" BMPs. *Id.* § 1329(b)(2)(B).

In the Everglades, the Florida Department of Environmental Protection and the University of Florida Institute of Food and Agricultural Services conduct a joint project to develop BMPs "to reduce nutrient loading (particularly from phosphorus) from farms in the Everglades Agricultural Area (EAA)." Office of Wetlands, Oceans, and Watersheds, U.S. EPA, *Nonpoint Source News-Notes* 12 (May 2003). As EPA explains, "[u]nder law, every grower in the EAA is obligated to implement a certain number of BMPs, the amount and kind of BMPs depending on the specific circumstances of the farm location, configuration, and cropping practices." *Id.* Beyond developing the original BMPs, "[t]he project continues to assist growers in BMP implementation to keep pace with their changing farm configurations and to develop additional BMPs as conditions change." *Id.* at 13.

Since implementation of the project BMPs, the reduction of phosphorus loads "has averaged more than 50 percent, and in some years has exceeded 70 percent" from the historic baseline. *Id.* These reductions substantially exceed the 1994 Everglades Forever Act's goal of a 25 percent reduction. *Id.* The project continues to examine ways to optimize the reduction of phosphorus loads caused by agricultural activities in the Everglades. *See id.* at 12-13.

Moreover, in the Everglades Forever Act, the State of Florida directed the Water District to construct more than 41,000 acres of wetlands to serve as Stormwater Treatment Areas (STAs). *See* South Florida Water Management District, *2003 Everglades Consolidated Report Executive Summary* 12; *see also* U.S. Br. *Am. Cur.* On Pet. 4-5 (discussing federal Everglades environmental protection legislation). The "STAs function by accumulating phosphorus in their sediments through biological and chemical wetland processes" and thus reduce the flow of phosphorus into the Everglades Protection Area. *2003 Everglades Consolidated Report*, at 72. In Water Year 2002 (May 1, 2001—April 30, 2002), the STAs "retained an average of 71 percent of inflowing phosphorus and decreased concentrations to an average below 40 ppb, well below the long-term design target of 50 ppb." *Id.* at 13. Because the Everglades Forever Act requires the "[o]ptimization of the nutrient removal performance of the" STAs, the Water District is engaged in additional research to increase their performance. *Id.* at 14. The District is also conducting extensive research into the effectiveness of advanced biological and chemical treatment technologies in removing phosphorus.[7] *See id.* at 15-17.

In sum, the NPDES program is not—and was not intended by Congress to be—the only mechanism available for reducing pollution in the navigable waters. Rather, Congress recognized that the causes of water pollution are complex and that control programs should be based on the source of pollutants. Congress also recognized "the economic, technological, and political limits on total elimination of all pollution from all sources." *Gorsuch*, 693 F.2d at 178. The court of appeals not only distorted the ordinary meaning of the CWA's language, it disregarded the policy reflected in the structure of the Act.

---

[7]Respondents seek to require the Water District to obtain an NPDES permit to operate S-9 primarily because it pumps "water contain[ing] higher levels of phosphorus than that naturally occurring in WCA-3A." Pet. App. 3a. While some field studies of advanced treatment technologies have shown the potential to reduce phosphorus outflow levels to near or slightly above the 10 parts per billion level, whether they can be successfully implemented on a large scale is still unclear. Moreover, while some technologies may greatly reduce phosphorus levels, they may also cause increased concentrations of other pollutants, such as aluminum and chloride. *See 2003 Everglades Consolidated Report*, at 16.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

September 10, 2003